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October 3, 2013

California High Speed Rail Authority
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Board Members
c/o Mr. Mark McLoughlin
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Sacramento, CA 95814

Surface Transportation Board
Chairman Elliot and Honorable Board
Members
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Federal Railroad Administration
Joseph C. Szabo, Administrator
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Mr. Horace Greczmiel
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Council on Environmental Quality
Executive Office of the President
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RE: Request for Recirculation of Revised Draft EIR/EIS for Fresno to
Bakersfield Segment of High Speed Train System; Supplemental EIR/EIS
to 2005 Programmatic EIR/EIS for High Speed Train System; and
Coordination of Project Planning and Environmental Review

Chairman Richard, Chairman Elliot, Administrator Szabo, Director Greczmiel and
Honorable Board Members:

Our firm represents Citizens for California High Speed Rail Accountability (CCHSRA), Kings County, and the Kings County Farm Bureau. It has come to our clients' attention that the Revised Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement: Fresno to Bakersfield (Fresno-Bakersfield Draft EIR/EIS) of the California High Speed Rail Authority (Authority) released in July 2012 describes a project with different alignments and features than is currently proposed for the High Speed Train (HST) system because major modifications have been made since it was released. Significant changes include the contemplated elevated rail system over the Kings River, a trenched alignment around 13th Avenue in Hanford, and the disclosure of new information about potentially significant geotechnical impacts. These changes represent significant changes in the design and environmental impacts of this segment of the HST. Therefore, the Fresno-Bakersfield Draft EIR/EIS must be recirculated with the current alignments and features, and an analysis of their impacts.

Furthermore, the circumstances under which the HST is being reviewed have

changed significantly with the Sacramento Superior Court's August 2013 ruling that the Authority violated the terms of Proposition 1A for funding and building the HST. Recirculation is also advisable because the Surface Transportation Board's June 2013 assertion of jurisdiction over the Merced to Fresno portion of the HST sets a precedent that could affect review of the Fresno-Bakersfield segment that was not anticipated in the Fresno-Bakersfield EIR/EIS.

For these reasons, in accordance with the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA) the Authority, the Federal Rail Administration (FRA), and the Surface Transportation Board (STB) must revise the Fresno-Bakersfield Draft EIR/EIS for the Fresno to Bakersfield segment to reflect changes in design, and re-release the draft for public review. (40 C.F.R. § 1502.9 [NEPA]; Pub. Resources Code § 21092.1 [CEQA].) You should also prepare a supplemental programmatic system-wide EIR/EIS¹ since the one approved in 2005 did not properly address at the program level alternatives and mitigation measures for impacts that are now apparent from further analysis. (40 C.F.R. § 1502.9 [NEPA]; Pub. Resources Code § 21092.1.)

We write to all of you because at this point it is unclear who will have decisionmaking authority over the High Speed Train project and its various segments. While we believe the High Speed Rail Authority is the Lead Agency for CEQA purposes for the entire HST and all its segments, we understand that the Authority has asserted that its environmental review authority is preempted by the assertion by the STB of authority over the HST in June 2013 pursuant to the Interstate Commerce Commission Termination Act of 1995 (ICCTA). The Authority, in litigation over the Bay Area to Central Valley segment of the high-speed rail system, asserted this action by STB had the effect of preempting its environmental review authority pursuant to the California Environmental Quality Act. We believe no such preemption has occurred and that while STB may have jurisdiction over the HST system, it is not exclusive. In the interest of efficiency, however, we write to each of you that may exercise some authority over the HST in the future, or over coordination proceedings related to the HST system.

Below we discuss some of the significant new information and recent changes that appear to have occurred based upon discussions with Authority Board Members, staff and consultants working on the project. In light of these changes, in addition to revising, recirculating, and supplementing the environmental review as appropriate, we also ask that you initiate coordination proceedings for your review with Kings County and other affected jurisdictions.

¹ We are relying upon the Final Program Environmental Impact Report/Environmental Impact Statement for the Proposed California HST System (Aug. 2005) (HST Program EIR/EIS), available on the Authority's website at http://www.hsr.ca.gov/Programs/Environmental_Planning/EIR_EIS/index.html.

I. Changes In The Project's Circumstances, Its Design, and Feasible Alternatives Require Supplemental Environmental Review and Recirculation of Draft Documents.

A. NEPA and CEQA Require Revision of a Draft EIS/EIR and Recirculation When There are Changes to a Project, New Information, or a Change of Circumstances Disclosing Significant Impacts.

Under NEPA, federal agencies reviewing major federal actions must take a "hard look" at environmental consequences of the proposed project, and the need for supplementation of the information in environmental impact statements. (*Kleppe v. Sierra Club* (1976) 427 U.S. 390, 410; *Marsh v. Oregon Natural Resources Council* (1989) 490 U.S. 360, 374.) CEQA requires that EIRs provide a thorough investigation and adequate analysis of project impacts in which a public agency finds out and discloses all that it reasonably can about project impacts. (Tit. 14. Cal. Code Regs. §§ 15144 and 15151.) Under both NEPA and CEQA, when significant new facts emerge about a project or alternatives to it, or the circumstances in which it is proposed, the environmental review documents for it must be supplemented, if they have already been approved (40 C.F.R. § 1502.9 [NEPA]; Public Resources Code § 21166 [CEQA]), or recirculated if they have not yet been approved (40 C.F.R. § 1502.9 [NEPA]; Public Resources Code section 21092.1).

NEPA provides the following:

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(40 C.F.R. § 1502.9.) Federal courts confirm this requirement of NEPA:

In view of this purpose, an agency that has prepared an EIS cannot simply rest on the original document. The agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a 'hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval.' *Id.* at 374, 109 S.Ct. 1851 (citations and quotations

omitted). It must 'ma[ke] a reasoned decision based on ... the significance-or lack of significance-of the new information,' *id.* at 378, 109 S.Ct. 1851, and prepare a supplemental EIS when there are 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.' 40 C.F.R. § 1502.9(c)(1)(ii). 'If there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.' *Marsh [v. Oregon Natural Resources Council]*, 490 U.S. at 374, 109 S.Ct. 1851 (citations and quotations omitted).

(*Friends of the Clearwater v. Dombeck* (9th Cir. 2000) 222 F.3d 552, 557-58.)

California Public Resources Code section 21092.1 provides:

"When significant new information is added to an environmental impact report after notice has been given . . . and consultation has occurred . . . , but prior to certification, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report."

(Pub. Resource Code § 21092.1.) New information is "significant," within the meaning of section 21092.1, if as a result of the additional information the EIR is "changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447; accord, CEQA Guidelines, Cal.Code Regs., tit. 14, § 15088.5, subd. (a).)

California Public Resources Code section 21166 provides supplemental review should be prepared when:

(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.

(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

(Pub. Resource Code § 21166.)

Thus, as explained below, the HST Programmatic EIR/EIS that was prepared in 2005 must be supplemented because significant new information is available that has system-wide implications as well as implications specific to the Fresno-Bakersfield segment of the HST system. A supplement to the Programmatic EIR/EIS for the HST System must be prepared to address new information and the availability of alternatives that avoid newly identified significant impacts. Furthermore, the draft environmental review documents for the Fresno-Bakersfield segment of the HST must be revised to include this new information and be recirculated.

B. Geotechnical Information Revealing Unanticipated Significant Impacts On Alignments of the Fresno-Bakersfield Segment of the HST Only Recently Came to Light.

On September 12, 2013, in response to a California Public Records Act request but no earlier, the Authority produced a copy of a report entitled "Draft 15% Submission Fresno to Bakersfield Geologic and Seismic Hazards Report, April 2013" (hereinafter, the Geologic and Seismic Hazards Report) that revealed some significant geotechnical information previously undisclosed to the public.² Since it was prepared in April 2013, it was not available at the time of the release of the draft Fresno-Bakersfield EIR/EIS in July 2012, or at the time of the HST Final Program EIR/EIS in 2005. The Report summarized the risks as follows:

The preliminary assessment of geologic and seismic hazards along the FB [Fresno-Bakersfield] Section of the HST identified in this study suggests that there is a *moderate to high risk of the following hazards*:

- Ground rupture — Kern County, Pond Poso Creek Fault³, and Edison Fault.

² This Report was posted by members of the public at <http://www.calhsr.com/wp-content/uploads/2013/09/FB-Geo-Seismic-Hazard-Report-15pct-Draft-Apr2013-Rpt-only.pdf>. Apparently, the Authority has still not distributed it to other members of the public. There are references in the Fresno-Bakersfield EIR/EIS to "The Fresno to Bakersfield Section: Geologic, Soils, and Seismicity Technical Report (Authority and FRA 2012)" and the "Fresno to Bakersfield Geologic and Seismic Hazards Report (Authority and FRA 2011a)" (Fresno-Bakersfield EIR/EIS, p. 3.9-1), but it is not clear those reports were available or distributed either. There apparently were no technical appendices for Chapter 3.9 on Geology, Soils and Seismicity posted online with the EIR. (See http://hsr.ca.gov/Programs/Environmental_Planning/revised_draft_fresno_bakersfield.html.)

³ Contrary to this statement of moderate to high risk in the Geologic and Seismic Hazards Report, the Fresno-Bakersfield EIR/EIS states the Pond Fault "is not likely to be a significant source of ground shaking." (Fresno-Bakersfield EIR/EIS, p. 3.9-16.)

- Seismically induced ground deformations — entire alignment.
- Shallow groundwater — Kings and Tulare Counties.
- Soil corrosivity and expansive soils – entire alignment.
- Loose granular soils where historical dune sand underlies the alignment.
- Strong motion ground shaking – Tulare and Kern Counties.
- Seismically induced flooding — between Fresno and Corcoran and Bakersfield.
- Land subsidence — entire alignment.
- Seasonal flooding — Fresno, Kings River Crossing, Corcoran, North of Wasco, Bakersfield.
- Soft compressible soils – historical Tulare Lake footprint.
- Slope instability — river channel slopes.

(Fresno to Bakersfield Geologic and Seismic Hazards Report, April 2013, pp. 1-1 to 1-2, emphasis added.) The Report further opined that “Most of the hazards either are distributed across the [Central] valley (such as potentially liquefiable soils) or run perpendicular to the proposed alignment (such as flood plains); therefore, avoidance by rerouting the proposed alignment [within the identified corridor] may not be a viable option.” (*Id.*)

In stark contrast with this admission of moderate to high risks for the “entire alignment,” the Fresno-Bakersfield EIR/EIS states “The severity of these risks is limited because the geology along the alignment alternatives, stations, and HMF sites is generally very competent, with only localized areas of potentially loose or compressible soils.” (Fresno-Bakersfield EIR/EIS, p. 3.9-26.)

Among other items revealed in the Geologic and Seismic Hazards Report, but not by the EIR/EIS, are the following:

“Until site specific, high-quality density results and ground motion investigations become available, the liquefaction hazard throughout the alignment should be considered moderate.” The Report states a “low” risk characterization is inappropriate. (*Id.*, at p. 4-24.) In fact, a “high” level of geologic and seismic hazards is noted in summary for many areas. (*Id.* at p. 8-1, Table 8.0-1.)

“The Rural South (FB-G) and Wasco Shafter (FB-H) subsections of the alignment were historically marshy and boggy areas that were subject to seasonal inundation. Although these areas are now drained it is likely that soft organic soils prone to settlement and low bearing capacity are likely to be encountered. The presence of soft organic soils may also increase the risk from the ‘bow wave’ effect.” (*Id.*, at p., 5-24).⁴

4 The Fresno Bakersfield EIR/EIS does not even mention, let alone address, the “bow

"5.7 Erodible Soils: Certain soil types demonstrate a higher potential for erodibility from the forces of water (rainfall and runoff) than other soil types do." (*Id.*, at p. 5-29.) Table 5.7-1 Soil Erosion Potential (USDA) shows that virtually the entire Fresno-Bakersfield alignment has Moderate to High soil erosion potential. (*Id.*, at p. 5-31.)

"Review of available historical seismic data and ground shaking intensity maps suggest that the seismic hazard along the Fresno-Bakersfield alignment is significant and requires further investigation." (*Id.* at p. 10-1).

"The presence of soft organic soils could increase the potential for the 'bow Wave Effect' associated with high speed trains. In summary, the primary potential geohazards or constraints associated with this section are potential for flooding and localized high groundwater table, liquefaction hazards, unknown soil conditions (near surface and at depth) with potentially soft compressible ground and abandoned or operational oil and gas wells." (*Id.* at p. B-8).

(Fresno to Bakersfield Geologic and Seismic Hazards Report, April 2013.) The Report admitted the data available from public sources that it used allowed for a qualitative analysis of hazards, "but was rarely refined enough to enable a specific quantitative assessment of the hazards for any particular section of the proposed alignment." (*Id.* at p. 1-1.)

Clearly, insufficient geotechnical investigation was conducted prior to circulation of the Fresno-Bakersfield draft EIR/EIS. This investigation is only now beginning to be addressed in the Geologic and Seismic Hazards Report. Therefore, the draft EIR/EIS must be recirculated with the new geotechnical information available in the Geologic and Seismic Hazards Report. (*Portland Audubon Society v. Babbitt* (9th Cir. 1993) 998 F.2d 705, 708 [a supplemental EIS should have been prepared because the scientific evidence raised significant new information relevant to environmental concerns].) Furthermore, because significant hazards are identified in the alignment that were not identified in the Program EIR/EIS, the Program EIR/EIS must be supplemented with this information about hazards and alternative means of avoiding them such as using the I-5 Corridor or SR-99 alignment.

The detailed geotechnical information necessary to design and analyze the impacts of

wave" effect. The "bow wave" effect, also known as train induced ground vibrations, can have significant and adverse safety impacts for high speed trains. ("Train induced ground vibrations: different amplitude-speed relations for two layered soils," Proceedings of the Institution of Mechanical Engineers, Part F: Journal of Rail and Rapid Transit, 2012, 226; published online 7 February 2012.)

the high speed train project is a significant analysis which is missing from the Fresno-Bakersfield Draft EIR/EIS. Recent detailed progress reports provided by Regional Consultant URS, consultants working on the project, highlight the need for detailed geotechnical information and the potential for significant impacts to the entire HST project. (Regional Consultant Monthly Progress Report, Fresno to Bakersfield for the Period of April 27, 2013 through May 24, 2013, Page 5). Page 5 of the report states:

As noted in previous monthly progress reports, the RC [Regional Consultant] considers *a lack of adequate geotechnical data a serious procurement risk to the authority as the design is currently based on assumed ground conditions.* Uncertainty about ground conditions could have significant impacts on bid prices, and likely would result in claims from the design/build contractor.

(Regional Consultant Report, p. 5, emphasis added.) Further in the report the Regional Consultant refers to the impact of the inclusion of new subsidence information which was not identified until the April 19, 2013 Geologic and Seismic Hazards Report. (Regional Consultant Report, p. 6.) Information that emerged includes the recognition that previous monuments in the Central Valley have moved 18 inches vertically and some have moved laterally. (*Ibid.*) This has caused a revision in track form and possibly the infrastructure used, thus creating unforeseen impacts.

Detailed geotechnical information must be included in the draft EIR/EIS for public review for the following reasons:

- Detailed subsurface explorations would indicate the depth to groundwater or the presence of perched groundwater. This information could guide the design choices for infrastructure, which in turn could affect local environmental impacts.
- Specific factual information about the perched groundwater will also show the Authority that in key areas where the alignment is being designed there is perched water that is at levels as low as 1-2 feet below ground surface. Water is so shallow that agricultural crops cannot be grown on the ground without drowning the root systems of the crops. In order to deal with this problem the Authority may need to use systems such as shallow water removal systems, however the disposal of this water may become an environmental impact to the local area.⁵

⁵ New potential impacts to local groundwater require consultation with the Regional Water Quality Control Board, the Kings County Water District, and other users of groundwater, which is critically important to Kings County's predominantly agricultural community. We note that the Kings County Water District, among others, is opposing the Authority's effort to validate the issuance of construction bonds in *High-Speed Rail Authority et al. v. All Persons Interested*, Sacramento Superior Court Case no. 34-2013-00140689.

- Geotechnical information is needed to address the varying degree of soils that are present within the Central Valley. Along alignments through Kings County, soils generally found around the Kings River will be of a sandy composition, while soils near the Tulare Lake Bottom will be finer and possess clay material. The presence of clay will induce shrinkage and swelling of soils depending on the presence and/or lack of water.

It is not sufficient that the Geologic and Seismic Hazards Report is available to your agencies and consultants. Instead, this information must be made available to the public and other public agencies for review and critical analysis. In *I-291 Why? Association v. Burns*, 372 F. Supp. 223 (D. Conn. 1974), *aff'd*, 517 F.2d 1077 (2d Cir. 1975), the court concluded that post-EIS studies by a local employee of FHWA could not save a defective EIS, in part because the studies were not circulated to other interested agencies, such as the Environmental Protection Agency (EPA) and the Council on Environmental Quality (CEQ). "The circulation and review requirements are critical features of NEPA's effort to insure informed decision making by providing procedural inputs for all responsible points of view on the environmental consequences of a proposed major federal action." (*I-291 Why? Association v. Burns*, 372 F. Supp. at 223.) The Second Circuit agreed: "These studies could not cure these particular inadequacies because they were not circulated for review and comment in accordance with procedures established to comply with NEPA." (*I-291 Why? Association v. Burns*, 517 F.2d at 1081; *see also Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 122 (D.N.H. 1975) [supplemental information not circulated in the same manner as a draft EIS cannot validate an otherwise deficient draft EIS]; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.)

C. Elevated Tracks On the BNSF (Eastern) Alignment of the Fresno-Bakersfield Segment of the HST System Are New.

During a recent meeting with Ross and Phyllis Browning and Karen Stout, who are CCHSRA members, our client discovered that the Authority now plans to provide an elevated track system over the three channels of the Kings River on the BNSF (Eastern) Alignment. This change in design presents a significant departure from the previous design offered by the Authority and would result in significant further environmental impacts.

The original Draft EIR/EIS, released in 2011, had an "at grade" design over the Kings River, which elevated the tracks over all three channels of the Kings River three feet above river levees to the bottom of the river trellis. (Draft Fresno to Bakersfield Section Draft EIR-EIS, Volume III, Section A - Alignment Plans, Drawing Nos. CB1816, CB1817 and CB 1818.) During the initial review of the project and after postponement of the 2011 public review period, the Authority was clearly put on notice by the Kings

River Water Authority, the Kings River Conservation District and many citizens that a three foot clearance was not appropriate for operation and maintenance of the river channels. However, the Authority left the three foot clearance design in for the design and analysis of the Revised Draft EIR/EIS.

While it is appropriate that the Authority has now recognized the problem with the original plan for crossing the Kings River, concerns that are apparent with an elevated track system versus an at-grade system include:

- Visual impacts to a current setting which is rural and scenic within the area.
- Sound impacts which will be greater due to the elevated tracks. Sound will not encounter the same dampening effect that would be if it were on the ground and absorbed by its surroundings.
- Increased intensive construction effort to construct concrete pillars and pylons.
- The increased impact to the nearby habitat that is caused by an elevated track and the increased effort required for construction.⁶
- Increased safety concerns for the residents in the area and for the riders in the event that an accident or health issue occurs in the elevated section.
- Impacts to local agriculture as the elevated tracks present a vertical impediment which can and will cause issues including with the local aerial application of pesticides and herbicides.

These potential impacts must be studied in a Revised Draft EIR/EIS for the Fresno to Bakersfield Segment of High Speed Train System.

D. The Hanford West Trench Alternative of the Fresno-Bakersfield Segment of the High Speed Train System Has Significant Previously Undisclosed Impacts.

The inclusion of a trench option in the Western Alignment through Kings County in the vicinity of 13th Avenue and across Highway 198 raises the possibility of significant complications with high local groundwater. As relayed to the landowners that met with the Authority, the plan is to include a 40 foot deep trench, which would be capable of accommodating four tracks of high speed rail. These design elements were not included in the original Fresno-Bakersfield Draft EIR/EIS. While they may be appropriate, concerns regarding the trenched alternative include:

⁶ Potential unforeseen habitat alteration and biological resource impacts require re-consultation with the federal Fish and Wildlife Service, the California Department of Fish and Wildlife, the Army Corps of Engineers, and the Environmental Protection Agency, among other agencies.

- Impacts to local perched groundwater both in hydrogeologic movement of water and in water quality.
- Safety concerns for the local area including traffic and pedestrian movements around the trench.
- Impacts to wildlife that use the corridor and their ability to traverse the trenched area.
- Noise impacts associated with the reverberation of sounds on surrounding concrete walls in the trench.
- Impacts to municipal and agricultural utilities that must traverse the trench.

Because of these significant design changes along the Fresno-Bakersfield segment, the Fresno-Bakersfield Draft EIR/EIS must be recirculated with this new information included so the public and public agencies may properly evaluate the changes.

E. Changes in the Circumstances of the High Speed Train Project Since the Programmatic EIR/EIS Was Approved in 1995 and the Draft Revised Fresno-Bakersfield EIR/EIS Was Released in 2012 Require Revisions to the Entire Analysis.

1. It is Necessary to Study and Fund the Entire High Speed Train System Initial Operating Section, Not Merely the Initial Construction Segment.

In August 2013, the Superior Court for the County of Sacramento concluded that the Authority violated the terms of Proposition 1A, the initiative measure entitled the "Safe, Reliable, High-Speed Passenger Train Bond Act for the 21st Century" that added section 2704 to 2704.21 to the Streets and Highways Code. The Court found that the Authority violated state law and "abused its discretion" in approving a funding plan that did not comply with the requirements of Proposition 1A. "Specifically the identification of the sources of all funds to be invested in the IOS [Initial Operating Section] and the certification regarding completion of necessary project level environmental clearances did not comply with the requirements set forth in the plain language of section 2704.08(c)(2), subsection (D) and (K)" of Proposition 1A. (August 16, 2013 Ruling on Submitted Matter: Petition for Writ of Mandate in *Tos et al. v. California High Speed Rail Authority*, Sacramento Superior Court Case No. 34-2011-00113919-CU-MC-GDS, p. 7.)

This court ruling, if it stands, has a profound impact on the continuing analysis of the High Speed Train system, including the Fresno-Bakersfield segment. As was made clear in the funding plan rejected by the court, the Authority currently has identified nowhere near the funds required to complete an Initial Operating Section. Since the court has determined adequate funding commitment is required for the entire initial operating section (from Merced to the San Fernando Valley), you have both the opportunity and

fiduciary duty to reexamine lower cost alternatives for the initial operating section, such as the I-5 Corridor and SR-99 Corridor alternatives. Early reports stated “the I-5 corridor offers . . . lowest capital costs.” (California HSR Corridor Evaluation and Environmental Constraints Analysis, Taylor et al., Journal of Transportation Engineering, Jan./Feb. 1997, p. 6.) “[T]he SR-99 corridor is estimated to be 4-15% more costly to build than the I-5 corridor.” (*Id.* at 8.) Therefore, you should reexamine the possibility of using the I-5 corridor as a cost-saving measure.

2. The Assertion of Surface Transportation Board Jurisdiction Creates a New Legal Regime Significantly Different From that Analyzed in the Draft Fresno-Bakersfield EIR/EIS and the HST Program EIR/EIS.

In June 2013, the Surface Transportation Board asserted jurisdiction over the Fresno to Merced portion of the High Speed Train system. (Surface Transportation Board, Decision, Docket No. FD 35724, California High-Speed Rail Authority-Construction Exemption – in Merced, Madera, and Fresno Counties, Cal., pp. 11-14.) Based upon this assertion of jurisdiction, the Attorney General of California has argued that CEQA is preempted. (Letter by Attorney General Kamala Harris to Third District Court of Appeal, June 26, 2013 in *Town of Atherton v. California High Speed Rail Authority*, Court of Appeal of the State of California, Third Appellate District, Case No. C070877.) While we disagree with the Attorney General’s opinion on this matter, assuming arguendo that the Attorney General is correct, this is a significantly different situation than was described in the Program EIR/EIS’s regulatory regime section where the Authority, not the STB, would conduct and approve site-specific environmental review. (Program EIR/EIS, p. S-21.)

3. Other Significant Changes in Various Portions of the HST System or Its Circumstances Require Supplementing of the HST Program EIR/EIS.

There are other design changes that affect the entire HST system that require review and supplementing of the Program EIR/EIS. For example, the re-design and relocation of the “wy” in the Chowchilla area represents significant changes in the project design with system-wide implications.

Another example of significant changes since the 2005 Program EIR/EIS is the Authority’s new plan, as of its April 2012 revised business plan, to operate high-speed trains “on the very same tracks as freight and conventional passenger trains” in the San Francisco Peninsula area. (Trial Brief of Union Pacific Railroad Company in *High-Speed Rail Authority et al. v. All Persons Interested*, Sacramento Superior Court Case no. 34-2013-00140689, p. 4.) Union Pacific Railroad initially objected to allowing the Authority to use its tracks, then entered a memorandum of understanding with the Authority. This type of blended usage of rail lines could significantly change travel times for the HST System (*ibid.*), thus affecting the ability of the HST to fulfill identified

purposes and needs for a high speed train system.

The California Legislature recently passed, and the Governor approved on September 6, 2013, SB 557 (Hill), which restricts the use of the blended rail system approach. If high speed rail is required to utilize separate tracks away from current stations, it may have the effect of depriving small cities such as Corcoran, Wasco, and Shafter of the train stations used by economically disadvantaged people that environmental justice regulations are designed to protect. This cumulative impact, in conjunction with those impacts identified in comments on the Fresno-Bakersfield EIS/EIR by Ybarra Company Public Affairs and Solutions Strategies International, Inc. dated October 17, 2012, require revision and recirculation of the EIS/EIR. Ybarra Companies and SSI noted that the Central Valley through which approximately 114 miles of the HST Project would cut is characterized by approximately 43 percent of the impacted population being Hispanic, with a total minority population of 56.6 percent, and annual median income substantially below the California average. They state "The corridor takes out homes, businesses, churches, shelters, and other community facilities where minority and low-income individuals live, work, and play . . ." (Ybarra and SSI Letter, p. 3, emphasis in original.) Page 3.12-8 of the RDEIR/SDEIS, in the section on Environmental Justice, notes "The environmental justice (EJ) analysis conducted for the Fresno to Bakersfield Section of the HST EIR/EIS identified the potential for the project to result in disproportionately high and adverse effects on minority and low-income populations." Federal agencies are required by Executive Order 12898 and Title VI of the Civil Rights Act of 1964 to avoid such impacts.⁷ Since the EIS/EIR itself identifies the potential for disproportionately high adverse effects on minority and low-income populations, your agencies must develop ways to avoid such impacts.

A third example of significant information available since the circulation of the Fresno-Bakersfield Draft EIR/EIS is the April 17, 2013 settlement between Madera County Farm Bureau, Merced County Farm Bureau, Preserve Our Heritage, and Chowchilla Water District on one hand and the Authority on the other in Sacramento Superior Court case number 34-2012-80001165. (We incorporate this settlement agreement by reference). The settlement is significant new information because it

⁷ Title VI of the Civil Rights Act, Section 601, provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." This provision is sufficiently broad to include prohibiting discrimination in state or local programs or activities, including permitting assessments, that receive federal funds." (Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice, US Commission on Civil Rights, October 2003, p. 31; available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.) Section 602 allows a violation to be established by proof of unintentional discrimination or disparate impact. (*Ibid.*)

provided for meaningful agricultural land loss mitigation measures very different from, and more effective than, those that were set forth in the EIR/EIS involved in that case or in the Fresno-Bakersfield EIR/EIS. Because of the recent availability of these new, more effective mitigation measures, if the Authority does not adopt them for the Fresno-Bakersfield segment, it must recirculate the Fresno-Bakersfield EIR/EIS to explain the measures and the reasons they would not be adopted. (Tit. 14 Cal. Code Regs. § 15088.5 subd. (a)(3) [EIR must be recirculated when "A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it."])

F. The Availability of An Environmentally Superior Alternative, the I-5 Corridor Alternative, Has Not Been Properly Analyzed in Publicly Reviewed Documents.

The Authority, FRA, and STB are required by CEQA and NEPA to study a reasonable range of alternatives. (*Natural Resources Defense Council v. Morton* (D.C. Cir. 1972) 458 F.2d 827, 836.) The Interstate 5 (I-5) corridor alignment through the Central Valley has repeatedly been advocated as a potential alternative but has been improperly omitted from the alternatives analysis in both the Programmatic EIR/EIS and subsequent documents. (E.g., California Farm Bureau Federation Letter dated October 19, 2012 re Fresno to Bakersfield Revised Draft EIR/Supplemental Draft EIS Comment.) Now that new information of significant, unforeseen alignment-wide moderate to high risks of seismically induced ground deformations, soil corrosivity, expansive soils, and land subsidence and a new legal situation brought about by Judge Kenny's decision and the STB's assertion of jurisdiction is apparent, there is an opportunity to properly analyze the feasibility and desirability of the I-5 corridor routing and other alternatives.

In 1995 the High-Speed Rail Commission studied three broad corridors: coastal, I-5 and SR-99. Early analysis stated the following advantages of the I-5 Corridor:

Interstate 5 (I-5) Corridor

The I-5 Corridor best serves the end-to-end markets. This corridor offers the shortest distances, lowest capital costs, fastest Los Angeles to San Francisco Bay Area travel times, and the highest overall ridership forecasts.

(California HSR Corridor Evaluation and Environmental Constraints Analysis, Taylor et al., *Journal of Transportation Engineering*, Jan./Feb. 1997, p. 6.)

Based on the ridership estimates of this study, the I-5 corridor will maximize the emission reductions because of higher ridership and minimal localized carbon monoxide emissions (due to minimal urban land cover).

(November 1995, Preliminary Environmental Constraints and Impacts Analysis, Parsons Brinckerhoff/JGM, Last sentence of the bulleted paragraph "High Speed Rail Air Quality Analysis Background Emission Sources: Emissions from Modal Shifts", 10th page of Appendix A, page 102 of pdf document at <http://www.calhsr.com/wp-content/uploads/2013/09/Environmental-Constraints-and-Impacts-Analysis-November-1995.pdf>.) Although these statements were contained in a preliminary report, they are as applicable today as they were when they were made.

Maximizing greenhouse gas emissions reductions is critical, because as pointed out by the California Legislative Analyst's Office, "an independent study found that- if the high-speed rail system met its ridership targets and renewable electricity commitments- construction and operation of the system would emit more GHG emissions than it would reduce for approximately the first 30 years." (Taylor, California Legislative Analyst's Office, April 17, 2012, "The 2012-13 Budget: Funding Request for High-Speed Rail.") This information became available after the approval of the Program EIR/EIS and constitutes another reason to supplement it.

In addition to the I-5 corridor being an environmentally superior alternative from the perspective of maximizing emission reductions and minimizing localized carbon monoxide emissions, it is a superior alternative from the viewpoint of biological resource impacts. As stated by expert biologists commenting on the Fresno-Bakersfield Draft EIR/EIS:

The choice of the BNSF/SR 43 alignment over an alignment following SR 99 or Interstate 5 itself ensures that the project will not minimize urban sprawl and impacts on the natural environment. Of all the possible routes through the Central Valley, even a cursory review of the distribution of sensitive species and lands would lead to the conclusion that the proposed Fresno to Bakersfield route along the BNSF right-of-way will be the most damaging to the natural environment. A review of all of the distributions of the sensitive bird species (from eBird maps, not included in this submission) shows this, as does a review of the natural habitat and protected lands that must be traversed.

(Dr. Travis Longcore and Catherine Rich, Land Protection Partners, October 16, 2012 letter to Dan Richard, Chair, Board of Directors, California High Speed Rail Authority, p. 37.)

The Program EIR/EIS approved in 2005 stated the reasons for eliminating the I-5 Corridor alternative from analysis in the HST Program EIR/EIS:

In summary, while the I-5 corridor could provide better end-to-end travel times compared to the SR-99 corridor, the I-5 corridor would result in lower ridership and would not meet the current and future intercity travel demand of Central

Valley communities as well as the SR-99 corridor. The I-5 corridor would not provide transit and airport connections in this area, and thus failed to meet the purpose and need and basic objectives of maximizing intermodal transportation opportunities and improving the intercity travel experience in the Central Valley area of California as well as the SR-99 corridor. For these reasons the I-5 corridor was dismissed from further consideration in this Program EIR/EIS.

(Program EIR/EIS 2-35, http://www.hsr.ca.gov/docs/programs/eir-eis/statewide_final_EIR_vol1ch2.pdf.) However, the reasons for rejecting analysis of the I-5 corridor altogether are not adequate under NEPA or CEQA. An alternative is not infeasible merely because it fails to meet every purpose and objective of the agency. (*Natural Resources Defense Council v. Morton* (D.C. Cir. 1972) 458 F.2d 827, 836; CEQA Guidelines section 15216.6(a) ["An EIR shall describe a range of reasonable alternatives to the project, or to the location of a project, which would feasibly attain *most* of the basic objectives of the project ...", emphasis added].) The feasibility and relative merits of the I-5 Corridor should have been explored in the Programmatic EIR/EIS so that the public and public agencies could compare it to other alternatives. This is especially true since, from several perspectives the I-5 corridor alternative appears to be the Least Environmentally Damaging Practicable Alternative (LEDPA).

In response to comments raising the possibility of using the I-5 corridor, the Authority has sometimes referred to the 2005 Program EIR/EIS and earlier corridor evaluation studies, claiming that I-5 was eliminated based on previous studies. However, *the I-5 has never been properly studied* in a document subject to public and peer review an EIR or EIS review process. Before proceeding with any further review, this omission of the I-5 Corridor from public analysis must be rectified.

In addition to the environmentally superior I-5 Corridor alignment, numerous other feasible alternatives, insufficiently analyzed previously, are available. One such alternative would be an alignment along the SR-99 Corridor that goes through Visalia. Such an alternative was analyzed in the August 1, 2007 "Visalia-Tulare-Hanford Station Feasibility Study" prepared for the Authority, but no alternative through Visalia was presented in the Fresno-Bakersfield EIR/EIS. Two other potentially feasible alternatives would be alignments that are either trenched below grade or tunneled to avoid surface impacts. While such alternatives may be more costly, the avoidance of environmental damage and savings in property acquisitions could potentially outweigh the increased costs. Without information about such alternatives, meaningful evaluation cannot be undertaken nor comparisons made.

In *Natural Resources Defense Council v. Morton*, 458 F.2d 827 (D.C. Cir. 1972), the court affirmed a district court holding that the Department of the Interior's Final EIS failed to discuss adequately the alternatives to the proposed leasing of offshore lands. On remand, the Interior Department attempted to comply with the court's decision by

supplementing its final EIS with an addendum, which discussed reasonable alternatives to the proposed action. Because the new material had never been circulated for comment as required by Section 102(2)(C) of NEPA, the district court refused to accept the statement as modified:

If this addendum is to be considered a part of the Final [EIS], then it must be subjected to the same comment and review procedures outlined by § 4332(2)(C) of NEPA, as was required for the original Final [EIS] which did not contain the addendum when it was first circulated.

(*Natural Resources Defense Council v. Morton*, 337 F. Supp. 165, 172 (D.D.C. 1972.)) Thus, federal courts require information that must be in an EIS to be in the document itself, so it may be subject to the comment and review procedures required by NEPA for an EIS. CEQA has similar requirements. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.)

II. Coordination With Kings County and Other Affected Jurisdictions Should be Undertaken.

The federal Council on Environmental Quality “has advised participating agencies to adopt a flexible, cooperative approach . . . The agency should first inquire of other agencies whether there are any potential conflicts. . . [T]he EIS must acknowledge and describe the extent of those conflicts. . . . Comments from officials of the affected area should be solicited early and should be carefully acknowledged and answered in the EIS.” (Council on Environmental Quality, “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” question 22-23c, 46 Fed. Reg. 18026, 18033 (1981); 40 C.F.R. § 1500.2(d).)

Repeatedly, Kings County has called on the Authority and FRA to coordinate their decisionmaking processes over the security, damages, planning impacts, and environmental consequences of the HST project with the County. (E.g., Kings County Community Development Agency letter to Authority Board and FRA dated October 19, 2012, pp. 2-4.) As Doug Verboon, Chairperson of the Kings County Board of Supervisors stated in his April 2, 2013 letter to Chairman Dan Richards of the Authority: “If a successful, quality, efficient, national model is the Authority’s objective, coordination is an elementary component supported by a host of California and Federal laws.” The need for coordination is supported by NEPA, CEQA, the Authority’s Merced-Fresno November 2009 Agency Coordination Plan, the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991, Executive Order 133352, the Passenger Rail Investment and Improvement Act of 2008, and the Authority’s former Chairman Pringle who spoke of a need for “close coordination” of the project in a “cooperative planning process” in his March 25, 2010 correspondence with the Los Angeles County Metropolitan Transportation and the Orange County Transportation Authority.

Coordination with Kings County is particularly important because the County has authority over review of such matters as encroachment permits for geotechnical, biological resource, and cultural resource investigations prior to construction that would occur within County rights-of-way or County owned property. Eventually encroachment permits would be needed for construction. Thus far, the County has denied such permits due to the failure of the Authority to ensure its proposals are consistent with the County's award-winning general plan and the needs of public health, safety, and welfare. (August 16, 2013 Letter from Kevin J. McAlister, Director of County of Kings Department of Public Works to Kinzie Gordon of URS/HMM/Arup Joint Venture [No encroachment permits will be issued until inconsistencies with County General Plan and safety and planning policies are resolved.])

Therefore, under the new facts and circumstances that exist today, we call again upon all of you, including STB, to properly and immediately coordinate with Kings County, other public agencies including but not limited to USACE, EPA, USFWS, CDFW, the State Water Resources Control Board, Caltrans, and affected members of the public before any further decisions are made or more momentum for approval of further segments of the HST is created.

Conclusion.

FRA, STB, and the Authority have failed to appropriately analyze high speed rail alignments through Kings County and ways to effectively avoid or mitigate their impacts. The continued review of the HST project now should encompass the significant changes that have occurred to the project and its circumstances. Significant changes include the contemplated elevated rail system over the Kings River, a trenched alignment around 13th Avenue in Hanford, and the disclosure of new information about potentially significant geotechnical impacts. Changes have occurred in the HST project's circumstances, including the assertion of STB jurisdiction over a major segment of the HST and the California Superior Court requirement that a larger portion of the HST system be analyzed adequately pursuant to Proposition 1A. With these recent changes in the project and its circumstances, CCHSRA, Kings County, and the Kings County Farm Bureau request that these changes be reflected in a Revised Draft EIR/EIS for the Fresno-Bakersfield alignment and a supplemental HST programmatic EIR/EIS that are both released to the public for a public review period of at least 90 days.

CHSRA, FRA, STB, CEQ
October 3, 2013
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Thank you for your consideration of these views. We look forward to your responses.

Sincerely,



Douglas P. Carstens

Cc:
Environmental Protection Agency
US Army Corps of Engineers
US Fish and Wildlife Service
California Department of Conservation
California State Water Resources Control Board
California Department of Fish and Wildlife
California Department of Transportation

